In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-210

JOHN NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. This is an action brought under the Freedom of Information Act, 5 U.S.C. 552, against the United States and its officials to compel them to permit petitioner, a pathologist at the University of Kansas Medical Center, to inspect, study and examine photographs taken of the autopsy of the late President John F. Kennedy; to study and to submit to "neutron activiation analysis" various specified exhibits of the Warren

Commission [1] and a grey-brown rectangular structure measuring approximately 13x20 mm. seen in photographs of the base of the brain of the late President; and to examine histological preparations of the margins of the bullet holes in the skin of the neck of the late President and the written diagnosis and/or findings made by the Bethesda Hospital radiologist from his study of the x-ray films taken during the autopsy (R. 1-18).

Pursuant to regulations promulgated under Public Law 89-318, 79 Stat. 1185, which authorized the acquisition of the Warren Commission exhibits, the Archivist of the United States offered to make available to petitioner for viewing all available material concerning the assassination. The Archivist also offered to make photographs for petitioner of the three dimensional exhibits which had been placed in glass cases for preservation. The Archivist, however, declined to allow petitioner to handle or submit these exhibits to any laboratory tests and, acting pursuant to a letter agreement with the executors of the estate of President Kennedy, the Archivist declined to make available x-ray films and photographs made at the autopsy,[2] and also declined to make available for test-

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[1] The specific items petitioner requested are set out in the opinion of the court of appeals (Pet. App. C, p. 34, n. 3).

[2] The autopsy materials come within paragraph II(2)(b) of the letter agreement which limits access to these items to (Pet. App. C, p. 34, n. 3):

> Any recognized expert in the field of pathology or related areas of science or technology, for serious purposes relevant to the investigation of matters relating to the death

ing and handling the clothing worn by President Kennedy on the day of the assassination.[3]

The Department of the Navy, from which petitioner requested the other autopsy materials (Pet. App. A,

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of the late President; provided, however, that no access to the Appendix B materials pursuant to this paragraph II(2)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative * * *. For the purposes of this paragraph, the determination of whether such an expert has suitable qualifications and serious purposes shall be made by the Kennedy family representative. No access shall be authorized pursuant to this paragraph II(2)(b) during the lives of the individuals referred to in the second paragraph of this agreement [members of the Kennedy family] for any purpose involving reproduction or publication of the Appendix B materials without the consent of the Kennedy family representative, who shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent such use of the Appendix B materials.

[3] The clothing comes within paragraph I(2)(b) of the letter agreement (Pet. App. C, p. 34, n. 3) which permits access to:

> Any serious scholar or investigator of matters relating to the death of the late President, for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials. * * *

Pursuant to the agreement the Archivist adopted regulations permitting serious scholars or investigators to view photographs of articles of the late President's clothing, but they are not permitted to inspect them physically or remove them from the National Archives (R. 25).

p. 31, n. 1), did not have custody of them and consequently denied petitioner's request (R. 48-50, 100).

2. The district court held that the materials sought by petitioner, with the exception of the diagnosis and findings of the radiologist, were not records within the meaning of the Freedom of Information Act (5 U.S.C. 552(a)(3)), which provides that "each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person".[4]

The court of appeals did not reach that issue, but held that even if these materials were records, they are within the exception to the Freedom of Information Act (5 U.S.C. 552(b)(3)) making the Act inapplicable where the records requested are "specifically exempted from disclosure by statute." The court noted that the materials requested were acquired either under the authority of Public Law 89-318, 79 Stat. 1185, relating to the acquisition of Warren Commission Exhibits, or under 44 U.S.C. 2107, 2108 (c), which authorizes the Administrator of the Gen-

[4] The request for the diagnosis and findings of the radiologist was made to the Department of the Navy. The Chief of the Bureau of Medicine and Surgery of the Medical Corps, who had command jurisdiction over Bethesda Naval Hospital, denied in an uncontroverted sworn affidavit having custody and control of this document and the other autopsy materials requested from the Navy. The district court granted summary judgment dismissing the complaint as to the Secretary of the Navy (Pet. App. B, p. 26).

eral Services Administration to accept for deposit papers, documents and other historical materials of a president of the United States.

Public Law 89-318, 79 Stat. 1185, authorizing the acquisition of the Warren Commission exhibits, expressly provides that items are to be acquired "for preservation under such rules and regulations as [the Administrator] may prescribe."[5] The court of appeals held that (Pet. App. C, p. 33):

> Pursuant to the authority granted by Public Law 89-318 the Archivist has prescribed rules and regulations concerning the viewing, study, and use of the Commission exhibits and which are reasonably designed to secure their preservation. Three-dimensional articles (most of the items sought by appellant) may be viewed by researchers, but may not be handled or tested; they may not be removed from the Archives building except with approval of the Archivist and only by a federal employee; their custody may not be given to any other person for any purpose. These rules and regulations are clearly within the scope of the congressional grant of authority of Public Law 89-318 and are reasonably designed to accomplish the purpose intended. We conclude that the items acquired by the United States pursuant to the provisions of Public Law 89-318 fall within the exception of 5 U.S.C. § 552(b)(3).

The statute authorizing the acceptance of presidential materials (44 U.S.C. 2107 and 2108(c))

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[5] The authority given the Administrator of General Services Administration has been delegated to the Archivist (Pet. App. C, p. 33).

through which the autopsy photographs and President Kennedy's personal clothing came into the possession of the Archivist, expressly authorizes acceptance of the materials subject to restrictions imposed by the donors. The court of appeals held that the restrictions, which were agreed to by the Administrator of the General Services Administration, similarly exempted the specified items from disclosure under 5 U.S.C. 552(b)(3) (Pet. App. C, p. 33-34).[6]

3. Petitioner's arguments are thoroughly discussed in the opinion of the court of appeals, upon which we rely. We also submit that for the reasons set out in its opinion, the district court properly concluded that the items were not "records" under the Freedom of Information Act (Pet. App. B, p. 26). Finally, in addition to the exemptions discussed in the opinions below, we submit that the Archivist complied with the Freedom of Information Act when he made "available" for viewing the Warren Commission exhibits and provided petitioner with photographs of the three-

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[6] Petitioner's challenge to the right of donors to impress restrictions on donated materials is without merit. See 44 U.S.C. 2107. Cf. also H. Rep. No. 998, 84th Cong., 1st Sess. p. 6: "* * * certain restrictions as to access and use [are] essential if private papers are to come into public custody at all." Petitioner's further assertion (Pet. 15) that the requested materials are not "papers, documents, or other historical materials," as those terms are used in 44 U.S.C. 2107, 2108(c), is baseless. Moreover, even though x-rays and photographs may have been developed at a U.S. Navy hospital, they are still "historical materials." Many Presidential materials are prepared under Government auspices. However, 44 U.S.C. 2107 and 2108 make no distinctions based on the original source of the donated material.

dimensional objects which had been placed in glass cases for preservation. Congress obviously did not intend that originals of irreplaceable records (assuming the items petitioner requested are "records") be made available "to any person" at any time to handle and conduct tests. Moreover, the autopsy report and related materials also come within the exemption to the Freedom of Information Act for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)). Under petitioner's construction of the Act, "any person" would have unrestricted access to autopsy materials and reports merely because the autopsy was performed in a government hospital. Congress could hardly have intended to authorize a procedure which would subject the family of the deceased to the extreme emotional distress attendant on such disclosure.

The courts below properly dismissed petitioner's complaint under the Freedom of Information Act.[7] It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[7] Petitioner's allegation that there is a dispute as to his intent, motivation, and overall purposes (Pet. 19) overlooks the fact that these considerations were not relevant to the denial of his request.

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